No. 20818

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REGINO MARTIN ESPINO,

Appellant,

vs.

OCEAN CARGO LINE, LTD., etc., *et al.*,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

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Jurisdictional Statement.

The admiralty and maritime jurisdiction of the district court in this cause is conferred by 28 U.S.C.A. §1333(1) and jurisdiction to review the district court's judgment is based upon 28 U.S.C.A. §1291.

Statement of the Case.

This litigation arises out of injuries allegedly sustained by appellant on February 29, 1964, while working in the hold of the S/S ATLANTIC GLADIATOR, a vessel then owned by appellee (hereinafter referred to as "respondent"), Ocean Cargo Lines, Ltd. The Libel alleges that appellant was, at the time of his injury, employed by the California Ship Service Com-

pany, a corporation, in the capacity of ship scaler, and was aboard the S/S ATLANTIC GLADIATOR in the course and scope of such employment.

The action in the district court was commenced by the filing of a libel *in personam* in admiralty on June 3, 1965, on a cause of action for negligence and unseaworthiness. [R. 28.] Paragraph XII thereof alleged as follows:

> "Libelant's suit is not barred by laches in that libelant was born in Cuba and cannot speak, read or write the English language, is uneducated and understood that his rights were limited to payments under Longshoremen's and Harbor Workers Act. At no time was he told by his employer or the Deputy Commissioner of Labor that he had any rights against the ship owner herein. Members of the crew of the vessel were present at the scene of the accident and were aware of it, and were in fact operating and controlling the winch and boom involved in the accident as above set forth, thus giving the officers and members of the crew of the vessel immediate knowledge that a serious injury to a worker had occurred. Respondents, and each of them, were thus put on notice of the accident and have not been prejudiced by any delay in the filing of this action by the libelant."

On August 13, 1965, appellant filed an amended libel, paragraph XII of which was in all respects identical to that of the initial libel. [R. 8-15.]

On August 26, 1965, respondent filed exceptions to the libel on the ground that appellant's claim was barred by laches [R. 16-17] and an affidavit by respondent's

counsel in support thereof. [R. 18-27.] Said affidavit averred in part as follows:

> "The S/S ATLANTIC GLADIATOR is a vessel which was owned by Ocean Cargo Line, Ltd., a member of the West of England Steam Ship Owners Protection & Indemnity Association. On July 19, 1965, I wrote to the West of England Association with a copy to Ocean Cargo Line (S. Livanos-Hellas, S.A., Piraeus, Greece) requesting information regarding the casualty, including information with respect to the availability of witnesses from among the ship's crew; the vessel's present whereabouts and current schedule; etc. On August 3, 1965, owners replied that they were unable to supply this information 'in view of the fact that this vessel is no longer owned by Ocean Cargo Line, Ltd., and the crew have long since scattered to various countries.' "

Appellant filed a memorandum of points and authorities in opposition to the exceptions on or about September 3, 1965. [R. Supp.] The matter was argued and submitted on September 7. On September 13 the district court's order sustaining the exceptions was entered. [R. Supp.]

The relevant portion of the order stated:

> "AND IT NOW APPEARING to the court that libelant's claim is barred by laches [Brown vs. Kayler, 273 F.2d 588 (9th Cir. 1959)]:
>
> "IT IS NOW, THEREFORE, ORDERED that said respondent's exceptions to the libel be and the same are sustained."

On September 23, 1965, appellant filed motion for leave to file second amended libel; memorandum of points and authorities in support thereof and proposed second amended libel. [R. 29-41.] The proposed second amended libel was identical to the predecessor except that it contained further allegations that:

> "As a direct result of libelant's inability to speak, read or write the English language, his lack of education and his misunderstanding of his rights, as aforesaid, libelant did not consult an attorney until May 13, 1965, fourteen and one half months after the date of the accident herein."

Respondent filed a motion to dismiss the proposed second amended libel, together with a memorandum of supporting points and authorities on September 29. [R. 41-43.] The matter was heard and submitted for decision on October 4. On October 6 the district court entered the following order:

> "AND IT NOW APPEARING to the court that the proposed second amended libel does not state a claim upon which relief could be granted:
>
> "IT IS NOW, THEREFORE, ORDERED that libelant's motion is denied."

On January 5, 1966, the district court ordered that judgment be entered against appellant in the following terms:

> "Libelant, Regino Martin Espino, having heretofore moved for leave to file a second amended libel in this matter, and said motion having been denied on the 6th day of October, 1965, and libelant, Regino Martin Espino, having elected to stand on such second amended libel without further motion to amend.

"The aforesaid libel of Regino Martin Espino is hereby dismissed and judgment of dismissal of said libel is ordered entered on the grounds that libel is barred by laches." [R. 48-50.]

Appellant's notice of appeal was filed the followed on January 14, 1966. [R. 50-51.]

Question Presented.

The question presented is whether the trial court abused its discretion in dismissing on grounds of laches appellants libel filed slightly more than 15 months after the alleged accident.

Prefatory Statement.

Appellant's opening brief makes two general assertions:

(1) That the trial court was confined to facts well pleaded in the libel, and erred in considering respondent's affidavit;

(2) That, on the merits, the trial court abused its discretion in dismissing for laches.

Before turning to a discussion of these two points it is appropriate to consider briefly the legal principles applicable to their review on appeal.

It is well established that trial court error will not be presumed on appeal.

Los Angeles Shipbuilding & Dry Dock Corporation v. United States, 289 F. 2d 222, 225 (9th Cir. 1961);

Schwartz v. Eitel, 132 F. 2d 760 (7th Cir. 1943).

Moreover, if error exists, it must be shown to have been prejudicial; if there be independent grounds to support the judgment, it judgment should be affirmed.

American Universal Insurance Co. v. Dykhouse, 326 F. 2d 694 (8th Cir. 1964);

Pursche v. Atlas Scraper & Engineering Co., 300 F. 2d 467, 487-489 (9th Cir. 1962).

The case at bar is one involving dismissal on the ground of laches. The question of laches is addressed to the sound discretion of the trial court.

Gardner v. Panama R. Co., 342 U.S. 29 (1951);

Morales v. Moore-McCormick Lines, 208 F. 2d 218 (5th Cir. 1953).

Accordingly, the trial court's judgment should not be disturbed on appeal unless it is so clearly wrong as to amount to an abuse of discretion, *e.g.,*

Goodwyn v. Dredge Ginger Ann, 342 F. 2d 197 (5th Cir. 1965);

Oroz v. American President Lines, 259 F. 2d 636 (2d Cir. 1958);

The KERMIT, 76 F. 2d 363 (9th Cir. 1935).

SUMMARY OF ARGUMENT.

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II.

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A. Appellant's Alleged Lack Of Education, Inability To Speak English, And Ingorance Of His Right To Sue Do Not Suffice To Excuse His Delay.

B. Appellant's Alleged Mistake Was One Of Law, Not Of Fact, and Resulted From His Failure To Make Such Inquiry As The Circumstances Required.

III.

APPELLANT FAILED TO ALLEGE FACTS NEGATIVING PREJUDICE TO RESPONDENT.

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B. Appellant's Libel Fails To Allege Facts Rebutting The Presumption Of Prejudice To Respondent, And Was Properly Barred Without Reference To The Facts Set Forth In Respondent's Affidavit.

C. Mere Knowledge Of The Casualty By A Crew Member Does Not Amount To Notice Of Claim Served Upon A Vessel Owner Or His Authorized Agent.

IV.

THE CALIFORNIA STATUTE OF LIMITATIONS IS THE PROPER STANDARD OF GUIDANCE.

ARGUMENT.

I.

THE DISTRICT COURT WAS PRIVILEGED TO CONSIDER RESPONDENT'S AFFIDAVIT.

Exceptions to a libel addressed to the jurisdiction of the court or to the question of laches may be decided on the basis of affidavits or exceptive allegations calling the court's attention to relevant facts.

> *Westfal Larsen v. Allman-Hubble Tugboat Co.*, 73 F. 2d 200 (9th Cir. 1934).

It is clearly established that the court may consider motions to dismiss accompanied by affidavits as being in the nature of motions for summary judgment and enter judgment accordingly.

> *Vacci v. Swedish American Lines,* 200 Fed. Supp. 207 (E.D. Pa. 1961);
>
> *International Longshoremen's and Warehousemen's Union v. Kuntz,* 334 F. 2d 165 (9th Cir. 1964);
>
> *Mantin v. Broadcast Music, Inc.,* 248 F. 2d 530 (9th Cir. 1957).

Counsel for appellant in the case at bar well knew this to be the law, and were aware of appellant's right to file counter-affidavits, having raised, unsuccessfully, the same argument here relied upon in the case of *Yerostathis v. A. Luisi, Ltd.*, No. 65-244-PH (S.D. Cal. 1966). That case involved exceptions to a libel on *forum non conveniens* grounds. In sustaining the ex-

ceptions, Judge Pierson Hall answered counsel for appellant regarding the use of affidavits as follows:

> "The libelant asserts that affidavits may not properly be considered on exceptions to a libel in an admiralty proceeding, citing *Cleary Brothers, Inc. vs. Luria Steel and Trading Corp.* (D.C. N.Y. 1960), 198 F.Supp. 567. That case in turn depended for its authority on the *Sydfold* case (2d Cir. 1936), 86 F. 2d 611, where the court held that the question whether or not the statute of limitations had run could not be raised by affidavit. Since the decision of both of said cases, the Supreme Court has added Admirality Rule 58 for summary judgment, corresponding to Federal Rules of Civil Procedure Rule 56 which permits matters to be raised on motions for summary judgment by affidavits.
>
> "Where here the exceptions are not in the form of a motion for summary judgment, the net effect of what the respondents seek by their exceptions is a summary judgment that this Court exercise its discretion and decline jurisdiction. In such an instance it appears to me that the use of the affidavits to supply information necessary for a decision is proper."

[The full text of Judge Hall's opinion in the *Yerostathis* case is included herein as Appendix A.]

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING FOR LACHES.

A. Preliminary Statement.

It is settled law that suits brought under the general maritime law are not time barred by statutes of limitation, but may be barred by laches. Whether a claim is barred by laches depends upon whether there has been unreasonable delay in filing the suit and consequent prejudice to the party against whom it is brought. This question is addressed to the sound discretion of the trial court, and must be decided on the basis of all the facts and circumstances of each case. This, of course, does not mean that analogous state statutes of limitation are immaterial. The trial court may consider the analogous state limitation period as a standard for guidance. Although the statute should not be accorded conclusive effect, the courts commonly hold that after the comparable statutory period has run the libelant has the burden of establishing that the delay has not prejudiced the respondent, and that exceptional circumstances exist to excuse the delay.

Gardner v. Panama R. Co., 342 U.S. 29 (1951);

Czaplicki v. S.S. Hoegh Silvercloud, 351 U.S. 525 (1965);

Brown v. Kayler, 273 F. 2d 588 (9th Cir. 1959);

Wilson v. Iron Works, 212 F. 2d 510 (9th Cir. 1954);

Redman v. United States, 176 F. 2d 713 (2d Cir. 1949);

Westfal Larsen v. Allman-Hubble Tugboat Co., 73 F. 2d 200 (9th Cir. 1934).

B. Appellant Failed to Allege Facts Excusing the Delay.

Appellant's libel was filed more than fifteen months after the alleged injury, and more than three months after the time within which to file suit under the analogous California statute of limitations had expired. The only allegations in the libel or first amended libel to excuse this delay were, in substance, that libelant was born in Cuba and is unfamiliar with the English language; that he is uneducated; that he understood his rights were limited to those accorded under the Longshoremen's and Harbor Workers' Act; and finally, that at no time was he told by his employer or the Deputy Commissioner of Labor that he was entitled to sue the vessel owner.

To these allgations, appellant's second amended libel added only that appellant did not consult an attorney until fourteen and one half months after the alleged accident—in short, that the delay was not due to any inadvertence or omission by his attorneys, but was entirely his own fault.

These allegations bear a striking resemblence to those found in *Smigiel v. Compagnie de Transports Oceaniques,* 185 Fed. Supp. 328 (E.D. Pa. 1960). In that case, a longshoreman seeking recovery for personal injuries averred:

> "[H]e was born in Poland, had a limited comprehension of English, and a limited ability to speak English. He is uneducated. He was given to understand . . . that his rights were limited to the payments under the Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. § 901, *et seq.* At

> no time was he told by the Deputy Commissioner . . . he had any rights against the ship owner." 185 Fed. Supp. at 329.

The court concluded that these facts, even if proven, did not excuse the delay, saying:

> "While the oft-repeated rule 'ignorance of the law is no excuse' is not applicable in every case, we think it must be applied here. We think that giving special consideration to one man's rights over those of others because he is uneducated and has a limited comprehension of English would be unfairly preferring that man." *Id.*, at 329-330.

It has been repeatedly held that allegations of libelant's ignorance of the law, lack of education, and inability to speak English to not suffice to excuse undue delay in filing suit.

Redman v. United States, 176 F. 2d 713 (2d Cir. 1949).

Brown v. Kayler, 273 F. 2d 588 (9th Cir. 1959);

Oroz v. American President Lines, 259 F. 2d 636 (2d Cir. 1958);

Morales v. Moore-McCormick Lines, 208 F. 2d 218 (5th Cir. 1953);

Smigiel v. Compagnie de Transports Oceaniques, 185 Fed. Supp. 328 (E.D. Pa. 1960);

McChristian v. Lykes Bros. S.S. Co., 94 Fed. Supp. 149 (S.D. Tex. 1950).

The case of *Morales v. Moore-McCormick Lines* is in all material respects on all fours with the instant case. The

Fifth Circuit Court of Appeals in upholding the trial court's judgment of dismissal, stated:

> "Here the appellants . . . claim special consideration on the ground that being ignorant and unlettered persons, a different standard should apply in their case. Their only excuse for delay in filing suit is that they did not appreciate the lingering effect of their illness and that they did not appreciate their legal right to bring a third party action for negligence. . . . As to their claim of ignorance of their legal right to sue a third party, the steamship lines which had contracted with their employer, *we know of no principle which enables persons to plead, not excusable ignorance of facts, but of the law which accorded them the right to sue.*" (Emphasis added.) 208 F. 2d at 221.

Similarly, in *Redman v. United States, supra,* the Second Circuit Court of Appeals made it clear that even if a libelant is ignorant of material *facts,* his ignorance must not be due to the failure to make reasonable inquiry. The libelants in that case argued that due to the nature of their injuries they were not fully aware of the fact that they had been injured for some time. In answer to this argument, the court held that:

> "Ignorance of facts material to a claim will not preclude the application of the doctrine of laches when ignorance is due to failure to make *such inquiry as the circumstances reasonably suggest.*" (Emphasis added.) 176 F. 2d at 715, 716.

In *Brown v. Kayler, supra,* the libelant filed suit in admiralty two months after the analogous state statute

of limitations had run. To overcome the *prima facie* prejudice resulting from this delay, libelant argued:

> "[L]ibelant is an Indian and unfamiliar with legal matters and had no knowledge of whether this was a trade name, a company, or a corporation, but believed and reported to his counsel that it was a corporation."

The District Court held that,

> "None of the excuses or reasons for delay are sufficient to overcome the presumption of prejudice to respondent. *None of these reasons present a condition which proper diligence could not have avoided.*" (Emphasis added.) 156 Fed. Supp. 11.

This court affirmed the judgment of dismissal on the grounds of laches.

> *Brown v. Kayler,* 273 F. 2d 588 (9th Cir. 1959).

For purposes of this appeal, respondent is compelled to accept appellant's averments that he was ignorant of his right to bring suit. However, this allegation by itself is not meaningful. Though given every opportunity, appellant failed to allege facts showing an exercise of proper diligence. It does not appear that he made inquiries of his employer, his union representative, the deputy commissioner of labor or anyone else concerning his right to sue. Since "it must be assumed" that his libel, as amended, "presented appellant's case in its most favorable light" (*Brown v. Kayler,* 273 F. 2d at 592), one can only conclude that no such inquiries were made. When one is injured by what he feels to be another's negligence, "proper diligence" would certainly seem to contemplate his deter-

mining whether he had a right to sue the allegedly negligent party. It would appear, therefore, that not only was appellant's alleged mistake one of law and not of fact, but it was necessarily grounded upon his "failure to make such inquiry as the circumstances reasonably [suggested]."

C. Appellant Failed to Allege Facts Negativing Prejudice to Respondent.

1. The Undisputed Facts Set Forth in the Affidavit Establish Clear Prejudice to Respondent.

The affidavit of respondent's counsel states that, though prompt steps were taken to develop information necessary to defend the suit, respondent was not able to supply this information because the vessel had been sold and its crew scattered to various countries. Although appellant had full opportunity to file counter-affidavits in an attempt to negative this clear showing of prejudice, he failed to do so. Appellant relied instead upon the argument that respondent's affidavit should simply be ignored because it failed to specify the date on which the vessel was sold—a curious approach from one upon whom the burden rests to establish that no prejudice resulted from his long delay. The gist of appellant's reasoning is that if it be *assumed* that the vessel was sold within a year following the accident, then respondent could not possibly be prejudiced since the libel, *had it been timely filed*, would not have been barred by laches. Clearly, this reasoning is fallacious. It confuses the fact of prejudice with an unrelated legal result. Had the libel been filed after the assumed date of sale, but within one year after the casualty, libelant could probably have avoided the defense

of laches on *grounds of excused delay*—notwithstanding prejudice to respondent. In this respect, the instant case falls squarely within the rationale of *Phillips v. Hellenic,* 179 Fed. Supp. 5 (S.D. N.Y. 1959):

> "[I]t is undisputed that the vessel upon which the alleged injury was sustained was sold by respondent, Compania Internationale de Pores Lta. approximately seven months after the accident and, since the first time it can be charged with knowledge of libelant's claim was March 1957 [subsequent to sale], prejudice seems too patent to be seriously denied." 179 F. Supp. at 8.

2. The Presumption of Prejudice Whice Results From Untimely Filing Is Alone Sufficient to Bar Appellant's Action.

Quite apart from the averments of respondent's affidavit, it is clear that appellant has failed to rebut the presumption of prejudice that flows from delayed filing. In an effort to satisfy this burden, appellant alleged, in essence, that members of the ship's crew had knowledge of the accident. The trial court, in the exercise of its discretion, found that these allegations were not sufficient.

Under certain circumstances, libelant's timely notice of claim may enable a vessel owner to fairly investigate and prepare to defend an anticipated lawsuit, notwithstanding the fact that the libel is not promptly filed. This is not aways the case, however, and it is clear that notice alone will not *ipso facto* rebut the presumption of prejudice. As the court stated in *Cleary*

Brothers, Inc. v. Luria Steel and Trading Corp., 198 Fed. Supp. 567 (S.D. N.Y. 1960):

> "Libelant's allegations do not aver sufficient facts to prove the absence of laches. The general allegations that there were numerous settlement discussions would not excuse the delay, and the fact that respondent had timely notice of the claim would not itself rebut laches. Timely notice would enable respondent to prepare its defense but nothing will take the place of prompt institution of suit and the resulting avoidance of prejudice arising from death or forgetfulness of witnesses." 198 Fed. Supp. at 570.

Clearly, the question of prejudice remains the touchstone. It is imperative that notice, if given, must be of such character as to fairly apprise the vessel owner of libelant's intention to hold him liable for his injuries so that the latter can investigate and prepare its defense. Each of the cases relied on by appellant stand for this proposition alone. Each involves a fact situation in which the vessel owner either was notified of libelant's claim or actually investigated the circumstances of the accident soon after its occurrence. Thus, in *Cities Service Oil Co. v. Puerto Rico Lighterage Company,* 305 F. 2d 170 (1st Cir. 1962), a collision action cited in appellant's brief (p. 6), the court gounded its decision vacating the trial court's dismissal upon the fact that:

> "The respondent was notified of the alleged collision and of libelant's claim for damages by cable . . . more than nine months before the analogous

> statute of limitations had run. . . . Respondent was made fully aware of the nature of the claim and was afforded adequate opportunity to investigate it." *Id.* at 171, 172.

The court added that the witnesses aboard were still in respondent's employ and that the chief officer, called by respondent as a witness, had a distinct recollection of the relevant facts.

In *Fidelity Casualty Company of New York v. C/B Mr. Kim,* 345 F. 2d 45 (5th Cir. 1965), which is also relied upon by appellant (App. Br. p. 6) a formal letter demand was sent to respondent four months after the accident. The respondent's attorney requested and received medical reports and engaged in settlement negotiations with libelant thereafter.

Likewise, in *Smigiel v. Compagnie, supra,* the court, after noting that ". . . in fact, the libel avers that respondent *did* make such an investigation" at the time of the accident, dismissed the exceptions on condition that the trial judge was convinced by libelant's evidence that respondent, "through its authorized agents, had knowledge of the accident at or about the time of its occurrence."

In *Claussen v. Mene Grande Oil Co.,* 275 F. 2d 108 (3d Cir. 1960), the court found that:

> "[I]t is clear that respondent knew of the injury and of appellant's claim very soon after the event. This is demonstrated by the fact that on December 1, 1947, less than three months after the accident [respondent], instructed Gulf to compensate appellant during its disability, and that such payments were actually made for several months at

> [respondent's] expense . . . It seems a fair inference that [respondent] made whatever investigation of the accident it considered appropriate during this period immediately after the accident." *Id.*, at 113.

The *Claussen* court went on to note that libelant had filed timely suit against a related corporation, Gulf Corporation, and that:

> "It appears that counsel who represented Gulf in the trial of this suit in the Western District of Pennsylvania is also representing [respondent] now. Gulf defended the Pennsylvania suit fully on the merits, although decision turned upon nonownership of the vessel." *Ibid.*

The *Gardner v. Panama Railroad Co.* case (App. Br. pp. 14-15) involved a passenger injured aboard respondent's vessel who put respondent on notice of her claim by twice filing actions against respondent within the year following her accident, each of which was dismissed for reasons unconnected with the merits of her claim.

The conclusion which flows from these cases is that the courts are concerned ultimately with the opportunity afforded the vessel owner to adequately prepare and defend against a claim of liability. Knowledge of the accident by a member of the ship's crew, a source ill-calculated to call the matter to owner's attention, was not a determinative factor in any of them. The distinction between mere knowledge of a servant and formal notice of claim directed to a vessel owner or its authorized agent is clear and well-recognized

Restatement, Agency, §§ 268(a), 269;

Addison v. Huron Stevedoring Corp., 96 Fed. Supp. 142 (S.D.N.Y.) at 158-159;

Foorman v. Myers, 1 Cal. App. 2d 719 (1934) at 722.

In each of the cases discussed heretofore, proper notice was afforded. In the case at bar appellant was granted a reasonable opportunity to plead such notice or other facts rebutting the presumption of prejudice in its various libels, or by way of affidavit had it chosen to do so. Appellant could not and did not do so. On these facts the trial court can hardly be said to have acted arbitrarily in finding against appellant on the question of laches.

III.

THE CALIFORNIA STATUTE OF LIMITATIONS IS THE PROPER STANDARD OF GUIDANCE.

The case at bar presents but one issue on appeal; whether the trial court abused its discretion in dismissing the libel and entering judgment for respondent. That issue is dispositive. From the record, and for the reasons heretofore stated, it is clear that the district court's judgment was well within the bounds of its discretionary power, and in accordance with the clear mandate expressed by this court in *Brown v. Kayler,* and the long line of cases which it followed. Appellant's brief pays little heed to this central issue, but relies, to a large extent, upon the assertion that the court below committed legal error in following *Brown v. Kayler,* and using as the preceptive standard the California one year statute of limitations instead of the three year period afforded by the Jones Act. The question of which statute

was the appropriate standard of guidance was neither briefed nor argued below. Moreover, the record contains not the slightest indication that the trial court accorded determinative significance to either statutory period. It reflects only the court's considered judgment that appellant's inexcusable delay prejudiced respondent, and facts more than adequate to support that judgment. Accordingly, this case is not one which compels a decision as to which statute of limitations should be applied as the standard of guidance. Nevertheless, in view of the weight appellant appears to attach to the contention that the Jones Act limitation period applies, we deem it necessary to respond.

Appellant requests this court to overturn the long line of cases culminating in *Brown v. Kayler*. The request is made on the basis of the decision in *Flowers v. Savannah Machine & Foundry Co.,* 310 F. 2d 135 (5th Cir. 1962),* which concededly is at variance with the cases not only in this circuit, but in other circuits as well. *E.g.,*

Czaplicki v. S.S. Hoegh Silvercloud, 351 U.S. 525, 76 S. Ct. 946 (1956);

Oroz v. American President Lines, 259 F. 2d 636 (2d Cir. 1958);

Guerrido v .Alcoa S.S. Co., 234 F. 2d 249 (1st Cir. 1956);

Kane v. Union of Soviet Socialist Republics, 189 F. 2d 303 (3d Cir. 1951).

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*The only other authority cited by appellant is the opinion in *Glidden vs. Isbrandtsen Co.*, 355 F. 2d 125 (4th Cir. 1966). While containing dictum recognizing the propriety of reference to the Jones Act as a guide, this case states only that the analogous state statute of limitations may be considered, and, in the last analysis, stands only for the proposition that neither prescriptive period should have a decisive influence.

The *Flowers* case involved a personal injury action in admiralty against a vessel owner by a shore based worker. The libel was filed subsequent to the running of the analogous state statute of limitations. By exceptions respondents urged that the libel was barred by laches. Libelant contended that the Jones Act limitation period rather than the state statutory period should be applied by analogy and that, if so applied, laches was not a bar. The district court rejected libelant's contention and, holding that libelant had failed to rebut the presumption of laches, dismissed the libel. On appeal, the circuit court, after noting that respondent's supporting affidavits cast considerable doubt on the intrinsic merit of its claim, went on to hold that the trial court had erred in selecting the state rather than the Jones Act standard. It specifically disclaimed any intention of passing on the merits of the laches question and remanded the case for "further and consistent" proceedings in the trial court.

The reasoning of the *Flowers* decision appears to be that:

(1) A shore based worker who by the authority of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946), is considered to be a "vicarious seaman" for purposes of the seaworthiness doctrine should, by reason of that fact, be entitled to draw by analogy upon the three years statute of limitations of the Jones Act; in short, that the policies which support the three year limitation afforded to Jones Act seamen apply equally to longshoremen and other "vicarious seamen";

(2) The use of the Jones Act statute of limitations as the analogous limitation period would have the advantage of promoting national uniformity of decision in the maritime field.

We will address ourselves to each of these points in turn.

Initially, it should be stated that the fact that the *Sieracki* court equated longshoremen with seamen in order that they might have a cause of action for unseaworthiness does not mean that they should be, or are, treated as seamen for other purposes. Thus, a seaman is entitled to maintenance and cure. A longshoreman is not. [*Dryden v. Ocean Accident & Guarantee Corp. Ltd.*, 138 F. 2d 291 at 293 (7th Cir. 1943)]. A seaman may prosecute his suit without prepayment of costs. A longshoreman may not. [*Borselli v. United States,* 74 Fed. Supp. 822 (1947)]. In a variety of other areas Congress has sharply differentiated between the rights of seamen as contrasted to harbour workers. [*Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 at 424-426; 46 U.S.C. §§ 18 *et seq.*] Clearly, there is no logic in assuming that a longshoreman, having been classified as a seaman for the limited purpose of the unseaworthiness doctrine, is also to be treated as a seaman for other and unrelated purposes.

Moreover, as the court in *Dawson v. Fernley & Eger,* 196 Fed. Supp. 816 (1961) stated to treat a longshoreman as a seaman for purposes of the Jones Act limitation period would:

> ". . . substantially nullify the Congressional action of 1927 when the legislative branch of our government saw fit to withdraw the longshoremen from the benefits of the Jones Act. There is no more

> reason to hold that a longshoreman's period of limitation is governed by the Jones Act than there is to conclude that a longshoreman may maintain an action under the Jones Act, which admittedly he cannot do since Congress acted to overturn *International Stevedoring Co. v. Haverty.*" *Id.,* at 821.

In deciding whether the court should apply by analogy the Jones Act limitation period in longshoremen cases, the policies upon which the Jones Act period rests should be examined. In enacting the Jones Act, Congress could have adopted any of the shorter state limitation periods, or it could have provided for application of the doctrine of laches which looks to state law as a guide. It chose neither course, but elected, rather, to accord the Jones Act seaman a *longer, fixed* period within which to bring suit. Clearly, the unique circumstances affecting the seaman's calling merit this result. A Jones Act seaman is a transient who is bound by ship's articles and the necessities of his profession to spend extended periods at sea far from the continental limits of the United States. When his ship touches port, it is generally for a brief period during which it bunkers and takes on cargo for another port in another state or country. Clearly, the seaman is faced with unique difficulties in bringing suit which justify a long limitation period of uniform applicability. The protracted periods at sea during which he has no access to legal counsel or the courts obviously bespeaks the need for a long statute of limitations. Since the seaman can hardly be expected to know the different limitation periods which obtain in the various states his ship may call on, and in which he may be obliged to bring suit, it is important that his right to sue be governed by a single fixed limitation period.

The Jones Act seaman is commonly not a resident of the state in which he brings suit. Accordingly, the state's legitimate interest in matters affecting its own residents is generally not a factor. As the Supreme Court in *Kossick v. United Fruit Co.*, 365 U.S. 731, 1961 A.M.C. 833, noted:

> "[I]t blinks at reality to assert that because a longshoreman, living ashore and employed ashore by shoreside employers, performs seaman's work, the state with these contracts must lose all concern for the longshoreman's status and well-being." *Id.*, at 739.

None of these incidents of the seaman's trade, which go to make up the policy foundation for the Jones Act limitation period, apply with respect to longshoremen.

In enacting the Longshoreman's and Harbor Workers' Act, Congress provided that longshoremen claims must be filed within one year after injury. [33 U.S.C. §913(a).] Similarly, Congress has recognized the application of a one year limitation period with respect to passenger claims. [46 U.S.C., §183(b).] Clearly, longshoremen, passengers, and other land-based individuals stand on an entirely different footing from the seagoing worker insofar as their ability to bring prompt suit is concerned. The variant circumstances of the Jones Act seaman and the longshoreman or other "vicarious" seaman, therefore, compels the conclusion that there is no logic in favoring the latter with a more extended period than that enjoyed by their fellow land-based neighbors.

The second and closely related basis advanced by the *Flowers* court in support of its decision is the policy

favoring national uniformity in the maritime field. The opinion, unfortunately, covers this point in conclusionary terms, and does not discuss the reasons why this policy requires adoption of the Jones Act period as the preceptive standard in longshoremen cases. It goes without saying that there are many areas in which the need for national uniformity is of compelling significance. As we have heretofore noted, the prosecution of seamen's claims falls into this category. The unique nature of the seaman's trade and the interstate and international character of ocean commerce necessitate uniform laws which individual states cannot provide. These factors are not present where we are concerned with the claims of nontransitory, non-seamen, shipboard workers. This is an area in which the state's interest is of predominant significance and in which the need for national uniformity is not apparent.

Beyond this, it is axiomatic that disuniformity is an inherent feature of the federal system; national uniformity cannot be achieved except at the cost of local uniformity.

> *Morales v. Moore-McCormick Lines, supra*, at 220;
>
> *Cleary Brothers, Inc. v. Luria Steel and Trading Corp., supra*, at 569.

To adopt the reasoning of the *Flowers* court would result in a host of anomalies. It would mean that the longshoreman injured aboard ship would stand in a different position from a fellow longshoreman injured ashore [*Weigel v. The Belgrano*, 299 F. 2d 897 (9th Cir. 1962)]; or the passenger or casual visitor injured aboard ship [46 U.S.C. §183(b)]; or his own family if

he were killed aboard ship. [*The Tungus,* 358 U.S. 588 (1959).] If the injured longshoreman were to prosecute his claim in a state court, he might well be bound by the state statute of limitations.

See

McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 224, n. 5.

Yet, if he chose to proceed in admiralty, under the *Flowers* decision, he could look forward to the much longer Jones Act period being adopted by analogy. Clearly, this result encourages forum shopping, and would run directly *contra* to the clearly expressed policy in favor of local uniformity articulated by the Supreme Court in *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938), and *Guaranty Trust Company v. York,* 326 U.S. 99 (1945).

It is interesting to note that several years after the *Flowers* decision the Fifth Circuit Court of Appeals again had occasion to consider the appropriate balance which should be affected between the need for national uniformity in the maritime field and the scope of state competence. This case, *Kenney v. Trinidad Corporation,* 349 F. 2d 823 (5th Cir. 1965), involved an action for the alleged wrongful death of a seaman. Libelant asserted that laches rather than the state one year statute of limitations should be applied. On appeal, the circuit court affirmed the trial court's decision rejecting this contention and applying the state statute of limitations as a bar. In so doing, the Fifth Circuit indicated that there was *no* strong policy favoring the federal concept to the exclusion of the state statute.

> "[T]here is no strong policy of the forum requiring application of the doctrine of excusable laches to state wrongful death actions . . . [I]n applying

> the doctrine of laches, federal courts are usually guided by the period of the analogous state statute of limitations. After the statutory period has run, the libelant has the burden of proving that the delay has not prejudiced the respondent and that there is a good excuse to justify his invocation of the doctrine." *Id.,* at 839.

By its attempt to achieve national uniformity in an area where there exists no strong policy favoring national uniformity, and in which complete national uniformity is not possible, the *Flowers* decision has intruded upon an area of state competence, and has ignored policies favoring local uniformity of a much more compelling nature. In this it has not and should not be followed.

Conclusion.

Although appellant was accorded ample opportunity to allege facts excusing his failure to file suit promptly, he failed to do so. The trial court properly held that appellants libel was barred by laches. The judgment should be affirmed.

Respectfully submitted,

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Howard J. Privett,
Winchester Cooley III,
Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WINCHESTER COOLEY

APPENDIX.

Order Declining Jurisdiction.

United States District Court, Southern District of California, Central Division.

Nestor Yerostathis, also known as Nestor Gerostathis, Libelant vs. A. Luisi, Ltd. and Shipping Developments Corp., Respondents. In Admiralty. No. 65-244-PH.

The Complaint is in two counts, one, under the Jones Act for negligence, and the other, unseaworthiness. Libelant asks general and special damages for the loss of four fingers and seeks to proceed under the provisions of Title 28, U.S.C. § 1916, without prepayment of fees or costs or security therefor.

The respondents have filed exceptions to the libel and supported the exceptions with affidavits concerning many material things about which the Company is silent.

The libelant asserts that affidavits may not properly be considered on exceptions to a libel in an admiralty proceeding, citing *Cleary Brothers, Inc. v. Luria Steel and Trading Corp.* (D.C. N.Y. 1960), 198 F. Supp. 567.[1] The case in turn depended for its authority on the *Sydfold* case (2 Cir. 1936), 86 F. 2d 611, where the court held that the question whether or not the statute of limitations had run could not be raised by affidavit. Since the decision of both of said cases, the Supreme Court has added Admiralty Rule 58 for summary judgment, corresponding to Federal Rules of Civil Procedure Rule 56 which permits matters to be raised on motions for summary judgment by affidavit.

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[1]Cf. *Fleet Corp. v. Rosenberg Bros.* (1928), 276 U.S. 202, 214.

While here the exceptions are not in the form of a motion for summary judgment, the net effect of what the respondents seek by their exceptions is a summary judgment that this Court exercise its discretion and decline jurisdiction. In such an instance it appears to me that the use of the affidavits to supply information necessary for a decision is proper.

From these affidavits we learn (1) that the vessel is registered under the Greek flag and manned by Greek subjects; (2) that respondent Shipping Developments Corp. is the owner and is incorporated and registered in Panama; and has its principal office in Piraeus, Greece; (3) that respondent A. Luisi, Ltd., is a British corporation whose stockholders are British citizens, and it acts as general agents of the owners; (4) that the libelant is a Greek citizen; (5) that he signed on at Belgium; (6) the ship's articles and his contract of employment are in the Greek language; (7) that by terms of the articles and contract any "claims due to illness or accident, the law courts of Athens will be solely competent"; (8) that the libelant was second engineer on said vessel (and the Court takes judicial notice that that position is one of considerable responsibility, whether the libelant was literate or illiterate); (9) that the injury occurred on October 8, 1963; (10) that on the 10th of October, 1963, the respondents repatriated the libelant to Greece by air from Chittagong, Pakistan, at the respondents' expense; (11) that on his arrival at Greece he was immediately met by a Greek doctor where he underwent an operation; and (12) that all

maintenance and expenses thereof were paid by the respondents. The libelant filed no affidavits, and its libel [verified by counsel on information and belief] is not contrary to any of the foregoing, except it alleges Luisi owned the ship. It is immaterial for the purpose of this motion as to whether Shipping Developments Corporation or Luisi was the owner.

The courts have discretion in declining to take jurisdiction in admiralty suits between foreign nationals. *Canada Malting Co. v. Peterson Steamships, Ltd.*, 285 U.S. 413; *Koziol v. The Fyglia* (2 Cir. 1956), 230 F.2d 651, cert. den. 352 U.S. 827.

The exceptions of the respondents to the libel are sustained, and the Court declines to accept or take jurisdiction for the reason that the libelant is a Greek; the contract by which he signed on was in Greek; he was returned to Greece by respondents after the accident and thus had access to the law courts of Athens which he agreed would be "solely competent" to determine any disputes concerning injury. It would be a grave abuse of discretion to do otherwise. See *Lauritzen v. Larsen* (1953), 345 U.S. 571.

In a case somewhat comparable to the instant case, *Hatzoglou v. Asturias Shipping Company, S.A.* (S.D. N.Y. 1961), 193 F. Supp. 195, the court declined jurisdiction conditioned upon the respondent's agreeing to submit itself to jurisdiction in Greece. Inasmuch as the libelant in this case made no effort whatsoever to disclose to the court what the Greek law is or why the

libelant, when he was in Greece, did not take advantage of his contract to recover under Greek law, after being flown there at the expense of respondents, I see no reason why such a burdensome condition should be imposed upon the respondents in this case.

It Is Hereby Ordered that the exceptions to the libel are sustained, and the case is dismissed, for the reason that the Court declines to take jurisdiction.

Dated: Los Angeles, California, February 23, 1966.

PEIRSON M. HALL
United States District Judge

(Seal)